Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAUL L. SARDUY

Petitioner/Appellant/Plaintiff

v.

SOUTHERN BELL TELEPHONE

Respondent/Appellee/Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Plaintiff was deprived of Due Process when:

a) The Magistrate conducted a hearing on Summary Judgment despite Plaintiff's Affidavit and Objection reminding about Plaintiff's pending appeal before the District Judge. The appeal would consider Magistrate's previous denial of a Motion for an Extension of Time to Complete Discovery filed by Plaintiff immediately after he begun proceeding pro se because discovery was incomplete.

b) Despite being fully briefed on Plaintiff's opposition to the Magistrate's hearing described in (a) above and before Plaintiff could file a Response to the Motion, the District Judge, without a transcript of the hearing in the record, upheld

the Magistrate's Recommendation and prematurely granted Summary Judgment to Defendant as to Count II (ERISA).

2. Whether the District Judge abused his discretionary power when:

a) He denied Plaintiff's Leave to Respond to two affidavits that Defendant incorporated to its Reply in support of the Motion for Summary Judgment. In the affidavits Defendant reargued matters covered in its initial memorandum of law in violation of Local Rules.

b) He ignored Defendant's admission in its Reply to the Motion for Summary Judgment that Plaintiff had established a prima facie case of discrimination under ADEA. The admission was acknowledged by the Magistrate in his Report and Recommendation but the District Judge ruled otherwise and granted Summary

Judgment to Defendant as to Count I (ADEA) by ignoring all the genuine issues of material fact advanced by the Plaintiff, by drawing inferences from evidence of the record, and by resolving disputed issues of fact as he usurped that function from the jury.

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OFFICIAL REPORTS OF OPINION DELIVERED IN THE CASE BY OTHER COURTS

1. *Report and Recommendation* signed by the U.S. Magistrate William C. Turnoff on January 25, 1991 (D.E. 77) on the Summary Judgment hearing he conducted on January 16, 1991.
2. *Order* signed by the U.S. District Judge Stanley Marcus on April 24, 1991 (D.E. 82) granting Defendant's Motion for Summary Judgment as to Count II and denying as to Count I.
3. *Report and Recommendation* signed by the U.S. Magistrate Ted E. Bandstra on October 22, 1992 (D.E. 186) on the Summary Judgment hearing he conducted on October 6, 1992.
4. *Order* signed by the U.S. District Judge Stanley Marcus on March 1, 1993 (D.E. 196) granting Defendant's Motion for Summary Judgment.

5. *Opinion* and *Judgment* signed by the U.S. Court of Appeals Circuit Judges Birch, Black, and Johnson, on April 14, 1995, Affirming, on Appeal, Summary Judgment for Defendant.
6. *Order* signed by the U.S. Court of Appeals Judges Birch, Black, and Johnson, on June 1, 1995, denying *Appellant's Petition for Rehearing.*

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction to the United States Supreme Court is invoked under:

1. 28 U.S.C. Section 1254 from the Affirmance Judgment entered by Circuit Judges Birch, Black, and Johnson, of the United States Court of Appeals for the Eleventh Circuit on April 14, 1995 (Appeal # 93-5093), on the Order granting Summary

Judgment to Defendant entered by the U.S. District Judge Stanley Marcus of the United States District Court for the Southern District of Florida, on March 1, 1993 (D.C. #89-1318-CIV-Marcus), which states in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"

2. The statutory provision believed to confer on this Court jurisdiction to review is derived from the power of supervision vested in Rule 10.1(a) of the United States Supreme Court which states in part:

> "When a United States court of appeals has rendered a decision..... or has so far departed from the

accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision".

3. Statutes involved in the case:

a) Age Discrimination in Employment Act (ADEA), 29 U.S.C.A., Sect. 623, et seq.

b) Employment Retirement Income Security Act (ERISA), 29 U.S.C.A., Sect. 1132, et seq.

CONCISE STATEMENT OF THE CASE

After the pre-employment interviews and tests, Petitioner Raul L. Sarduy (hereinafter "Sarduy") was hired by Defendant Southern Bell Telephone (hereinafter "Southern Bell") in the non-management position of Switchman, in Miami, Florida, on March 19, 1970, at age 37 1/2. While a Switchman, Sarduy completed all the training required by

Southern Bell, work under three supervisors and received all the contractual wage progression increases and benefits scheduled within his rate scale. During his off hours Sarduy completed an Associated of Science degree in Engineering Technology sponsored by the Southern Bell Tuition Assistance Plan. On November 1, 1973, Sarduy was promoted to the management position of Assistant Engineer at the Building Engineering Department in Fort Lauderdale, Florida, and on May 16, 1975, Southern Bell assigned Sarduy to the Facility Planning Department. On April 1, 1976, Sarduy was transferred to the position of Frame Engineer in Miami, Florida, and on June 1, 1976, Southern Bell assigned Sarduy as a Trunk Forecaster to the North area of Florida.

On or about November 1, 1982, Southern Bell centralized all the areas of

Trunk Forecasting under the supervision of Rich Eiger, and on January 1, 1986, when Southern Bell combined the Trunk Servicing and Trunk Forecasting groups, Sarduy was assigned as a Trunk Servicer/Forecaster Engineer to the South/Southeast area of Florida.

While a management employee (13 years and 9 months), Sarduy completed all the training and tests required at all the departments he was assigned to and received commendations. Sarduy had seven supervisors who increased his salary over 270% based on a better than average work performance. During his off hours, Sarduy completed a second degree (Bachelor of Science) in Engineering Technology, sponsored again by the Southern Bell Tuition Assistance Plan. This second college degree made Sarduy the second highest academically qualified in his group of ten.

During his employment with Defendant (17 1/2 years), Sarduy only missed two days of work and received Perfect Attendance awards.

Effective January 1, 1984, AT&T and the Bell regional companies became independent from each other and in 1985 Southern Bell (now owned by BellSouth) started a management reduction program. On January 1, 1986, when Sarduy was assigned as a Trunk Servicing/Forecasting engineer to the South/Southeast area of Florida, he was the senior engineer in that group and the closest to attain full retirement pension and benefits. Upon assignment, Sarduy was immediately subjected to more frequent reviews and lower evaluation ratings than his coworkers. The intense scrutiny began within the first month of that assignment and concluded 18 months later with his termination when he was replaced, on the

same day, with a lower paid employee 21 years younger outside the protected age group. Sarduy was 2 1/2 years away from full retirement pension and benefits. Upon termination, Southern Bell offered Sarduy $9,380 severance pay that Sarduy refused as deemed to be a waiver of his right to sue.

After obtaining a right to sue from the E.E.O.C., Sarduy, by and through his attorney, filed suit on the U.S. District Court for the Southern District of Florida on June 27, 1989 (Case #89-1318-CIV-Marcus) under the Age Discrimination in Employment Act (ADEA) for Count I and under the Employment Retirement Income Security Act (ERISA) for Count II. On Count I Sarduy contended that Southern Bell fired him because of his age, and on Count II Sarduy contended that Southern Bell terminated him to interfere with the attainment of his full retirement pension

and benefits. Subsequently, Sarduy retained two other attorneys over the following 10 months until Sarduy's funds were depleted because of the heavy discovery demands by Southern Bell that included four days of deposition. On October 26, 1990, Sarduy filed a Notice to Proceed Pro Se, but not being an attorney and overwhelmed with the immense legal task, Sarduy filed a Motion for Continuance and Extension of Time on November 13, to complete discovery that was pending when his former attorneys withdrew from this cause because of his lack of funds. Within two weeks, Southern Bell inundated Sarduy with a voluminous Motion for Summary Judgment and an untimely Pretrial Stipulation. On November 21, the District Judge referred Sarduy's Motion for Continuance and Southern Bell's Motion for Summary Judgment to the Magistrate. On December

12, the Magistrate scheduled oral arguments on the Motion for Summary Judgment for January 16, 1991, and denied Sarduy's Motion for Continuance. Sarduy immediately filed an Affidavit in Support of his Objection and Appeal to the District Judge because his discovery was not completed. Furthermore, there were two Motions to Compel filed against Southern Bell by Sarduy's former attorneys prior to subject hearing date. Nevertheless, the Magistrate proceeded with the hearing over Sarduy's affidavit and objection ore tenus and recommended that both Counts of the Motion for Summary Judgment be granted to Southern Bell. Sarduy timely opposed the Recommendation by filing his Objection. On April 24, 1991, the District Judge upheld the Magistrate's Recommendation and granted Summary Judgment to Southern Bell on Count II while overturning on Count I and

granted Sarduy an extension of time to complete discovery.

Sarduy complied with all of Southern Bell's discovery requests. Southern Bell, however, failed to comply with Sarduy's discovery requests as cause for five Motions to Compel. On March 2, 1992, Southern Bell filed its third Motion for Summary Judgment on Count I and Sarduy was forced to retain another attorney to prepare the Response to the Motion and attend the oral argument thereafter.

In its Reply to its Motion for Summary Judgment Southern Bell conceded, and the Magistrate later concurred in his Report and Recommendation, that Sarduy had established a prima facie case of discrimination for purpose of the summary judgment. In its Reply, Southern Bell incorporated two supplemental affidavits in support of the Motion for Summary Judgment and reargued matters covered in

its initial memorandum of law, in violation of Local Rules.

That being the case, Sarduy filed a Request for a Leave of Court to Respond, in compliance with the Local Rules, but the District Judge denied his Request on March 1, 1993, and in the same Order the Judge ignored all the issues of fact that Sarduy advanced in his Response, drew inferences from the evidence in the record, resolve issues of fact reserved for the jury, and granted Summary Judgment to Southern Bell.

On March 11, 1993, Sarduy filed a Motion to Set Aside Order Granting Defendant's Motion for Summary Judgment and to Re-Open Discovery due to Newly Discovered Evidence, and on April 16, 1993, Sarduy filed a Motion to Alter or to Amend Final Judgment. Both Motions were denied by the District Judge on September 3, 1993.

On October 1, 1993, Sarduy filed a Notice of Appeal in the Court of Appeals for the Eleventh Circuit (Case 93-5093), and on April 14, 1995, Circuit Judges Birch, Black, and Johnson Affirmed the Judgment of the District Court granting Summary Judgment to Southern Bell. Finally, on May 1, 1995, Sarduy filed a Petition for Rehearing that was Denied by the same Judges on June 1, 1995. *(Appendix F1)*.

REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS

Not much can be reviewed of the judgment of the United States Court of Appeals for the Eleventh Circuit in this cause because the Do Not Publish opinion of the Court was limited to the last sentence at the end of the one-page outline of the case, to wit:

"After reviewing the record, we conclude that Sarduy's contentions are meritless. AFFIRMED." *(Appendix, E3)*

DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The United States Supreme Court with its power of supervision represents the last opportunity available to Sarduy to prove, as wrong, the ruling of the United States Court of Appeals for the Eleventh Circuit affirming the Order of the District Court for the Southern District of Florida erroneously granting Summary Judgment for Southern Bell. Sarduy feels that the Court of Appeals sanctioned the departure of the District Court, at least in four occasions, from the accepted and usual course of judicial proceedings, given rise to this Petition for Writ of Certiorari.

Here are four of the departures in chronological order:

1. January 16, 1991. The Magistrate conducted an oral argument hearing on summary judgment in disregard of Sarduy's affidavit in opposition and verbal objection (ore tenus) intended to remind the Magistrate that an appeal was pending before the District Judge. The appeal was decisive to the convening of said hearing as the District Judge would rule on the Magistrate's previous denial of a Motion for Continuance and Extension of time that Sarduy filed immediately after he began to proceed pro se because his discovery was incomplete. *(Appendix, B4)*.

> "It has been well established that a motion for summary judgment shouldn't be heard until there has been an adequate opportunity for

> discovery, the facts have been fully established and after discovery has been completed". *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 at 1145 (5th Cir. 1973) (en banc) cert. denied 414 U.S. 1116, 94 S.Ct.849, 38 L.Ed.2d 743.

Furthermore, in his Report and Recommendation dated January 25, 1991, the Magistrate recommended that both Counts of the Motion for Summary Judgment be granted to Southern Bell *(Appendix, A8)*. Sarduy timely objected to the recommendation.

2. April 24, 1991. Despite acknowledging Sarduy's Affidavit and Objections to the Magistrate's Hearing on Summary Judgment because discovery was incomplete (described in #1 above), the District Judge, without a transcript of that hearing in the record and before Sarduy could file a Response to the Motion, upheld the Magistrate's Recommendation and

prematurely granted Summary Judgment to Southern Bell as to Count II (ERISA claim), stating in his Order that Sarduy "didn't object and it was undisputed he had not exhausted his administrative remedies" (*Appendix, B2-3*).

> "Before findings of magistrate are effective, trial court must actually read transcript of hearing".
>
> *United States v. Elsoffer*, 644 F.2d 357 (5th Cir. 1981) later app 671 F.2d 1294 (11th Cir. 1981).

> "Generally, summary judgment is inappropriate when party opposing motion has been unable to obtain responses to his discovery requests".
>
> *Cowan v. J.C.Penney*, 790 F.2d 1529 at 1532 (11th Cir. 1986).

The District Judge, however, overruled the Magistrate as to Count I and allowed Sarduy time to complete discovery. Subsequently, during discovery, Sarduy learned that the

BellSouth Management Pension Plan offered no administrative remedies to a fired employee who, although vested, had not yet applied for retirement pension like Sarduy. Simply stated, Sarduy did not have to exhaust any administrative remedy, but most important, Sarduy was denied the right to complete discovery on Count II.

> "Exhaustion of administrative remedies is not required where it would prove futile".
> *Republic Steel Co. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965).

> "....[t]he decision whether to apply the exhaustion requirement is committed to the district court's sound discretion and can be overturned on appeal only if the district court has clearly abused its discretion".
> *Curry v. Contract Fab., Inc. Profit Sharing Plan*, 891 F.2d 842 at 846 (11th Cir. 1990).

> "....[s]ummary judgment should not ordinarily be granted where the facts alleged by the plaintiff

provide a ground for recovery at least not withhold allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendant's affidavits".

Schsoehbaum v. Firstbrook, 405 F.2d 215 at 218 (2nd Cir. 1968)(en banc), cert. den., 395 U.S. 906, 89 S.Ct 1747, 23 L.Ed.2d 219.

3. March 1, 1993. By denying Sarduy's Request for Leave of Court to Respond to Southern Bells's Reply to Summary Judgment, the District Court precluded Sarduy the opportunity to respond to two supplemental affidavits that Southern Bell incorporated in support of its Motion for Summary Judgment. In the affidavits Southern Bell reargued matters previously covered in its initial memorandum of law in violation of Local Rule 10 C, which states in part:

"....[w]hich reply memorandum shall be strictly limited to

rebuttal of matters raised in the memorandum in opposition without reargument of matter cover in the movant's initial memorandum of law".

However, Sarduy's Request of Leave of Court to Respond complied with Local Rule 10 C, which states in part:

"No further or additional memoranda of law shall be filed without prior leave of Court".

4. March 1, 1993. The genuine issues of material fact that Sarduy advanced in his Response to Southern Bell's Motion for Summary Judgment compelled Southern Bell to admit in its Reply to the Motion that Sarduy had established a prima facie case of discrimination under ADEA. The admission was acknowledged by the Magistrate in his Report and Recommendation *(Appendix, C11)*, but the District Judge ignored both acknowledgments and granted Summary

Judgment to Southern Bell as to Count I (ADEA) by departing from the accepted and usual course of judicial proceedings, as follows:

a) By ignoring <u>all</u> the genuine issues of material fact advanced by Sarduy as to whether Southern Bell's reason for discharging Sarduy was pretext for age discrimination.

> "During the consideration of a motion for summary judgment, any doubts as to the existence of genuine issues of fact are to be resolved against the moving party".
>
> *Goodman v. Mead Johnson & Co.* 534 F.2d 566 at 573 (3rd Cir. 1976), cert. den. 429 U.S. 1038, 97 S.Ct 732, 50 L.Ed.2d 748 (1977).

> "Summary judgment is appropriate in those cases in which there is no genuine issue of material fact".
>
> *Rollins v. TechSouth, Inc.* 833 F.2d 1525 at 1527-28 (11th Cir. 1987), citing *Fed.R.Civ.P. 56(c)*.

> "Existence of one genuine issue

of material fact is sufficient to preclude summary judgment". *Gavin v. People National Gas Co.*, 613 F.2d 482, (3rd Cir. 1980).

b) By failing to afford Sarduy benefit of all reasonable inference to be drawn from evidence of the record.

"On a motion for summary judgment, all evidence and inference are to be viewed in a light most favorable to the non-moving party".
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 at 255; 106 S.Ct 2505 at 2513, 91 L.Ed.2d 202 (1986).

c) By resolving for himself all disputed issues of fact that should have properly been left to jury to decide.

"In ruling on a motion for summary judgment the court's function is to determine whether such genuine issue exists, not to resolve any existing factual issues".
United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct 993, 8 L.Ed.2d 176.

"In ruling on motion for summary judgment, court may not weigh conflicting evidence to resolve

factual disputes; if genuine issue is found, summary judgment must be denied".

Ryder International Corp. v. First American National Bank, 943 F.2d 1541 (11th Cir 1991).

Notice: *Petitioner Sarduy did not attach a list of:*

(1) the genuine issues of material fact that Sarduy advanced,

(2) the inferences the District Judge drew from evidence of the record, and

(3) the disputed issues of fact resolved by the District Judge, referred to in sub-paragraphs (a), (b) and (c) above, because Sarduy, as a pro se, wasn't sure as to whether it was appropriate to include those documents in a Petition for Writ of Certiorari since the issues involved had supposedly been considered by the Court of Appeals.

Nevertheless, a comprehensive list and argument of those issues can be

found in pages 11 through 30 of Plaintiff's Response to Defendant's Motion for Summary Judgment filed at the U.S. District Court for the Southern District of Florida (D.E. 162, Case 89-01318-CIV-SM); pages 23 through 33 of the Appellant's Brief, and pages 13 through 19 of the Appellant's Reply Brief filed at the U.S. Court of Appeals for the Eleventh Circuit on October 1st, 1994, and November 25th, 1994, respectively (Appeal # 93-5093). Sarduy holds his own copy of the three papers. Should Sarduy must provide them to this Court, Sarduy will immediately do so upon request, or the Clerk of this Court can obtain them directly from the Clerks of the lower courts if he/she so desire.

End of Notice.

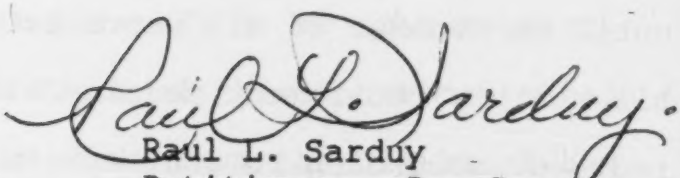
The departure from the accepted and usual course of judicial proceeding incurred by the District Court helped in granting Summary Judgment for Southern Bell and precluded Sarduy from demonstrating in trial the flagrant injustice perpetrated by Southern Bell in terminating Sarduy at age 54, with 17 1/2 year of service and 2 1/2 years needed to receive a monthly retirement pension plus benefits. At age 65 his retirement pension would be, according to Southern Bell, approximately $1,171.00 a month, plus all benefits. By terminating Sarduy, Southern Bell liberated itself from all financial responsibilities toward Sarduy until he becomes 65 (11 years later), when his monthly retirement pension will be reduced, according to Southern Bell, to $669.33 and no benefits. Sarduy was replaced on the same day he was fired with a lower paid employee 21 years younger

outside the protected age group.

Finally, it is significant to notice that no departure from the District Court favored Sarduy; all the departures favored Southern Bell.

WHEREFORE, pursuant to the foregoing, Petitioner Sarduy respectfully requests this Honorable U.S. Supreme Court to grant his Petition for a Writ of Certiorari to review the decision of the Appellate Court's affirming the District Court's rulings on both Counts of Southern Bell's Motion for Summary Judgment.

Respectfully submitted,



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APPENDIX

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Opinion and Judgment signed by the U.S. Court of Appeals Judges on April 14, 1995 E1

Order on Petition for Rehearing signed by the U.S. Court of Appeals Judges on June 1, 1995 F1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-1318-CIV-MARCUS

RAUL SARDUY,

Plaintiff,

vs. REPORT AND RECOMMENDATION

SOUTHERN BELL TELEPHONE
TELEGRAPHIC, INC., a
Georgia Corporation,

Defendant.
_____/

This Cause is before the undersigned on Southern Bell Telephone And Telegraph Company's Motion For Summary Judgment (D.E. 65), filed November 16, 1990. Plaintiff filed an Opposition To Defendant's Motion For Summary Judgment (D.E. 68) on November 26, 1990, and Defendant filed a Reply to Plaintiff's Opposition (D.E. 71) on December 5, 1990. Oral argument on the Motion For Summary Judgment was held before the undersigned on January 16, 1991, pursuant to Notice filed December 13, 1990 (D.E. 73).

The Complaint herein states a two-count cause of action against Defendant. In Count I Plaintiff alleges that he was terminated by Defendant due to his age in violation of the Age Discrimination In Employment Act of 1974 [ADEA] as amended, 29 U.S.C. Sect. 621 et seq. In Count II of the Complaint Plaintiff alleges that he was terminated by Defendant in order to interfere with his ability to accrue sufficient service so that he would become pension eligible, in violation of Section 510 of the Employee Retirement Income Security Act of 1974 [ERISA] as amended 29 U.S.C. Sect. 1001 et seq.

In order to prevail in an ADEA cause of action, Plaintiff initially bears the burden of establishing a prima facie case of discrimination by a preponderance of the evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In the context of a discharge claim, a prima

facie showing requires proof that the plaintiff was: 1) within a protected age group; 2) qualified for his/her position; 3)terminated; 4) replaced by younger employee.

If a prima facie case is established, the burden of proof shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). If the defendant meets its burden, the plaintiff must then prove, by a preponderance of the evidence, that the defendant's articulated justification is a pretext for discrimination. McDonnell Douglas, at 804-805.

Defendant concedes that Plaintiff has established a prima facie showing of elements one, three, and four, supra. However, Defendant contends that Plaintiff has not made a prima facie showing of

element number two, supra, that is, that he was qualified for his position. Alternatively, assuming that Plaintiff has met his prima facie burden, Defendant contends that it has irrefutably articulated a legitimate, nondiscriminatory reason for its action.

Indeed, Defendant's Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried, attached as an appendix to the Motion For Summary Judgment, sets forth facts which establish a legitimate, nondiscriminatory reason for its action. These facts are discussed in detail in the Memorandum Of Law Defendant has submitted in support of its Motion For Summary Judgment. Therein, Defendant sets forth the extensive efforts it made to assist Plaintiff in fulfilling the requirement of his job description, and, failing that, its efforts to maintain

employment with Defendant, albeit in a non-management position.

Defendant's statement of the facts is, for purposes of this record, unrefuted by Plaintiff. In his reply, Plaintiff has not disputed Defendant's factual proffer. "All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement." Local Rule 10.J.2. Plaintiff's statement at oral argument that he was qualified for the position in question is legally insufficient. See, Grigsby v. Reynolds Metals Company, 821 F.2d 590, 595-96 (11th Cir. 1987).

The standard to be applied in reviewing a summary judgment motion is set forth in F.R.Civ.P. 56(c): "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

As stated in Celotex Corporation v. Catrett, 477 U.S. 317, 322-323 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment.....against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a

sufficient showing on an essential element of her case with respect to which she has the burden of proof." In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), the Supreme Court stated that the mere existence of a scintilla of evidence in support of a position will be insufficient; see also, United States v. Twenty (20) Cashier's Checks, 897 F.2d 1567 (11th Cir. 1990).

Inasmuch as Plaintiff has not met his burden as required by the applicable caselaw, that is, because Plaintiff has failed to establish an essential element of his claim, Defendant is entitled to Summary Judgment as to Count I.

Similarly, Defendant is entitled to summary judgment on the ERISA claim, Count II. It is undisputed that Plaintiff herein failed to exhaust administrative remedies available under the pension plan at issue. See, Mason v. Continental

Group, Inc., 763 F.2d 1219 (11th Cir. 1985).

Therefore, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED as to Counts I and II of the Complaint.

Pursuant to 28 U.S.C. Sect. 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable Stanley Marcus, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B 1982).

Respectfully Recommended, in Chambers, at Miami, Florida, this 25 day of Jan., 1991.

WILLIAM C. TURNOFF
United States Magistrate

cc: Keith Kochler, Esquire
Robert Beatty, Esquire
Raul Sarduy, pro se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-1318-CIV-MARCUS

RAUL SARDUY,

Plaintiff,

ORDER

vs.

SOUTHERN BELL TELEPHONE TELEGRAPHIC, INC., a Georgia Corporation,

Defendant.
_____/

FILED BY D.C.
APR 24 1991
T.G. Cheleotis
CLERK U.S.DIST.CT.
S.D.OF FLA-MIAMI

THIS CAUSE has come before the Court upon the Report and Recommendation of U.S. Magistrate William C. Turnoff, filed January 25, 1991, recommending that Defendant's Motion for Summary Judgment be granted as to counts I and II of the complaint. After an independent review of the Report, the record, and Objections filed by Plaintiff, and for the reasons set forth below, we hereby REJECT the Magistrate's Report, in part, ADOPT it, in part, and REMAND the cause to Magistrate Turnoff for further proceedings.

In his Report, Magistrate Turnoff recommends that summary judgment be entered in favor of Defendant for Counts I and II of the complaint, thereby dismissing the case, In Count I, Plaintiff alleges that he was terminated by Defendant due to his age in violation of the Age Discrimination in Employment Act of 1974 ("ADEA"), as amended, 29 U.S.C. Sect.621 et seq. In Count II, Plaintiff alleges that he was terminated by Defendant in order to interfere with his ability to accrue sufficient service so that he would become pension eligible, in violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. Sect.1001 et seq.

As to Count II, the Magistrate found that the Defendant was entitled to summary judgment on the ERISA claim because it is undisputed that Plaintiff failed to

exhaust administrative remedies available under the pension plan at issue. Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985). Because there is no genuine "dispute" as to this material fact, we agree with the Recommendation and Order that summary judgment be entered against Plaintiff as to Count II. We add that Plaintiff did not object to this finding in his Objections, filed February 12, 1991.

As to the ADEA claim in Count I, Magistrate Turnoff found that Plaintiff had failed to make a sufficient showing that he was "qualified for his position," an essential element which must be satisfied in order to be entitled to relief and assert a prima facie case. McDonnell Douglas Corp. V. Green, U.S. 792 (1973). Because Plaintiff was not able to proffer sufficient evidence in order to create a genuine factual dispute as to

whether he was "qualified", the Magistrate concluded that "Defendant [was] entitled to Summary Judgment as to Count I." Report at 4 (*Exhibit A7*). Plaintiff strongly objects to this particular ruling because he claims that he was not afforded a fair and reasonable opportunity to complete discovery in order to rebut Defendant's Motion for Summary Judgment. Plaintiff points out that on November 13, 1990, he filed a Motion for Continuance and Extension of Time which was Denied by Magistrate Turnoff and timely Appealed. The Magistrate's ruling, however, was made before the appeal had been ruled upon by this court.

Plaintiff filed his Motion for Continuance for the following grounds: (1) Plaintiff's former attorneys began to withdraw from this action while discovery was pending; (2) discovery and depositions were not completed; (3) Plaintiff is now

proceeding Pro Se because he is unemployed and has no funds for legal assistance; and (4) Plaintiff believes that this continuance will clearly reveal evidence that he was qualified for his position when he was terminated. We realize that although such motions for continuances are a matter of discretion, Plaintiff has made a sufficient showing supporting a need for a continuance. Therefore, out of an abundance of caution, see e.g., Harrell v. Directors of Bureau of Narcotics and Dangerous Drugs, 70 F.R.D. 444 (E.D. Tenn. 1975), we Reverse Magistrate Turnoff's denial of Plaintiff's Motion for Continuance and Extension of Time and Grant Plaintiff an extension of thirty (30) days from the date of this Order to complete discovery.

Before Plaintiff's case may be dismissed from the court, he should have a reasonable opportunity to complete

discovery based on the possibility that such discovery might create a genuine issue as to whether Plaintiff was qualified for his position before he was fire. We believe that the circumstances of this case warrant a reasonable extension and find that the Magistrate's ruling on the Motion for Summary Judgment was premature. Accordingly,

It is hereby ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED as to Count II and DENIED as to Count I. We REMAND the cause to the Magistrate for further proceedings.

DONE AND ORDERED at Miami, Florida, this 24 day of April, 1991.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

cc: Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 89-1318-CIV-MARCUS

RAUL SARDUY,

Plaintiff,

vs.

SOUTHERN BELL TELEPHONE
TELEGRAPHIC, INC.,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Southern Bell and Telegraph Company's Motion for Summary Judgment filed on March 2, 1992. On April 2, 1992, this motion was referred to United States Magistrate Judge Ted E. Bandstra by the Honorable Stanley Marcus for a Report and Recommendation pursuant to 28 U.S.C. Sect. 636. Accordingly, the undersigned conducted a hearing on this motion on October 6, 1992. Having carefully considered the pleadings, the affidavits

and relevant portions of the record, oral argument of counsel and applicable law, the undersigned respectfully recommends that this motion for summary judgment be GRANTED for reasons set forth below.

PROCEDURAL HISTORY

On June 27, 1989, Raul Sarduy ("Sarduy") filed this age discrimination action against his former employer, Southern Bell Telephone and Telegraph Company ("Southern Bell"), seeking damages for alleged violation of the Age Discrimination Employment Act, 29 U.S.C. Sect. 621, et seq. ("ADEA"), and the Employee Retirement Income Security Act, 29 U.S.C. Sect. 1001, et seq. ("ERISA"). In essence, Sarduy complained about his discharge from employment by Southern Bell in July 1987, believing that his discharge was the result of his age and Southern Bell's interest in saving money by

terminating Sarduy prior to his reaching full retirement age.

On May 7, 1990, Southern Bell first moved for summary judgment on the ADEA and ERISA claims as set forth in Sarduy's complaint. In summary, Southern Bell argued, with respect to the ADEA claim, that Sarduy failed to establish an essential element of his claim, i.e., that he was qualified for the position he held with Southern Bell; or, alternatively, that Sarduy failed to rebut with sufficient evidence Southern Bell's legitimate non-discriminatory reason for termination of this employee. As to the ERISA claim, Southern Bell argued that Sarduy failed to exhaust his administrative remedies as a prerequisite to such a claim.

On April 24, 1991, this Court dismissed the ERISA claim finding that Sarduy had failed to exhaust his

administrative remedies available under the pension plan at issue. See Court Order dated April 24, 1991 (D.E.82). As to the ADEA claim, this Court denied summary judgment at that time finding that Sarduy should be granted a reasonable opportunity to complete discovery on the factual issue of whether he was qualified for the position for which he was terminated in 1987.

Following April, 1991, the parties engaged in further discovery in the case. Reviewing the Court file, it appears that Sarduy requested certain documents from Southern Bell, requested additional time to complete discovery, and, on more than one occasion, moved to compel the production of documents. Ultimately, discovery was completed and pretrial stipulations were filed in the case.

In March 2, 1992, Southern Bell filed its second motion for summary judgment on

Sarduy's ADEA claim. In essence, Southern Bell again argues that Sarduy fails to present any evidence to support his claim that he was subjected to more demanding and disparate working conditions or that he was terminated because of his age. Once again, Southern Bell submits extensive documentation and affidavits of supervisors and other personnel supporting Southern Bell's claim that Sarduy was terminated for substandard performance for a period of time prior to his termination.

On May 18, 1992, Sarduy responded in opposition to Southern Bell's motion again arguing Southern Bell's discrimination based on age and the reason for his termination. In support thereof, Sarduy noted his age at time of termination (54), his replacement by a younger employee, and additional work assigned prior to termination which, Sarduy believes, raises questions of facts sufficient to rebut

Southern Bell's alleged reason for termination. Additionally, Sarduy notes the number of Southern Bell employees over forty years of age terminated in 1986 and 1987, his own calculations of monies saved by Southern Bell resulting from his termination, and other factors discussed below as evidence of Southern Bell's discriminatory firing in his case.

STANDARD OF REVIEW

The court in reviewing a motion for summary judgment is guided by the standards set forth in Rule 56(c) of the Federal Rules of Civil Procedure which provides as follows:

> .... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law ....

The moving party bears the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). Further, in addressing whether the moving party has satisfied this burden, the court is required to view the evidence and all factual inferences arising therefrom in the light most favorable to the non-moving party Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368 (11th Cir. 1982), citing, Adickes v. S.H. Kress & Co., 398 U.S. at 157, 90 S.Ct. at 1608; August Iron & Steel Works v. Employers Insurance of Wausau, 835 F.2d 855, 856 (11th Cir. 1988). If the record presents issues of material fact the court must deny the motion. Adickes v. S.H. Kress & Co., 398 U.S. at 157, 90 S.Ct. at 1608. The non-moving party, however, cannot rest upon mere allegations, but must rebut any facts properly presented by the moving party

through affidavits or other evidence demonstrating the existence of a genuine and material issue of fact for trial. Id. at 398 U.S. 155, 90 S.Ct. at 1607. Moreover, summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986).

Summary Judgment for defendants are not rare in employment discrimination cases. See e.g., Earley v. Champion International Corp., 907 F.2d 1077 (11th Cir. 1990); Mauter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Grigsby v. Reynolds Metal Co., 821 F.2d 590 (11th Cir. 1987); Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir. 1983). Even where a plaintiff makes out a prima

facie case, a defendant employer may be entitled to summary judgment if it produces evidence of legitimate, non-discriminatory reasons for the employment action. Earley, 907 F.2d at 1081. "To survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason [for termination] is mere pretext. Mere conclusory allegations and assertions will not suffice." Id.; citing Mauter, 825 F.2d at 1558; Grigsby, 821 F.2d at 596-97; and Pace, 701 F.2d at 1391. In cases where discovery has been conducted, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party or a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Earley, 907 F.2d 1080, quoting

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2511 (1986). Most important, the plaintiff always bears the ultimate burden of proving discriminatory treatment by a preponderance of the evidence. Id., citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).

CONCLUSIONS OF LAW

In order to establish a prima facie case of discrimination in ADEA cases, a plaintiff must prove (1) that he is a member of the protected group (i.e. between 40 and 70 years of age); (2) that adverse employment action has been taken against him (i.e. discharge); (3) that he was replaced by a person outside of the protective group; and (4) that he was qualified for the position for which he was rejected. Pace, 701 F.2d at 1386; Price v. Maryland Casualty Co., 561 F.2d

609, 612 (5th Cir. 1977).[1] In Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735-36 (5th Cir. 1977), this test was modified in cases where a plaintiff is discharged from a previously held position. In such cases the prong requiring proof of qualification is removed and the plaintiff must prove only that the employer replaced him with someone outside the protected group and specifically sought to replace him with a younger person. Id., see also Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369 (5th Cir. 1980).

In the instant case, Southern Bell concedes, for purposes of this motion, that Sarduy has established a prima facie

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[1]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

case of discrimination under the ADEA, but argues that he fails to present "concrete evidence" in the form of specific facts which show that Southern Bell's proffered reasons for Sarduy's discharge was mere pretext. Thus, Southern Bell argues that Sarduy presents no evidence, even after additional discovery, to show that he was terminated due to his age rather than for substandard performance as amply documented by the affidavits of Sarduy's supervisor, written performance evaluations and other work records of this former employee.

Reviewing Sarduy's position, the undersigned finds that he has advanced no evidence "significantly probative" from which a jury could conclude that age was a factor in his discharge. Rather, Sarduy only claims that age was a reason for his discharge, but offer little more than conclusory allegations beyond the

undisputed facts that he was in a protected age group, adversely affected by termination, and replaced with a younger person. In fact, the circumstances of Sarduy's discharge as a servicer/forecaster for Southern Bell allow no inference that age was a substantial motivating factor in his discharge. By Sarduy's own admission, no other service/forecaster of Southern Bell were discharged prior to obtaining full retirement benefits. Moreover, Sarduy offer no evidence that Southern Bell specifically sought to replace him with a younger person.

Reaching this conclusion, the undersigned has carefully considered all direct, indirect and circumstantial evidence offered by Sarduy in his attempt to defeat summary judgment in this case. Actually, Sarduy offers no direct evidence of discrimination such as any

incriminatory statement by his employer indicating that Sarduy was fired due to his age. Sarduy's only indirect or circumstantial evidence consists of his age at termination, the age of his replacement (33), and his successful conclusion of "additional" tasks assigned by his employer prior to discharge. These facts, even viewed in a light most favorable to Sarduy, are not significantly probative on the termination issue. Sarduy's additional "evidence", in the form of other lawsuits filed against Southern Bell, an affidavit of a co-employee, monies allegedly saved by Southern Bell due to his termination, Southern Bell's denial of administrative remedies following work performance evaluations, and periodic evaluations immediately prior to termination, are either without factual support or are totally irrelevant to the discrimination

alleged in this lawsuit. Finally, Sarduy's statistical evidence concerning the number of Southern Bell employees terminated over the age of 40 is both miscalculated and meaningless without evidence concerning the size and age distributions of Southern Bell's employees at the time of these alleged terminations and that such employees were similarly situated at the time of their terminations.

In summary, Sarduy presents no more evidence of a discriminatory termination than that previously presented and found lacking to defeat summary judgment. At best, Sarduy's evidence suggests only a remote possibility that age figured into the discharge decision. A plaintiff, when placed with a motion for summary judgment in this type of case, cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather

must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by defendant. Pace, 701 F.2d 1391. In this case, Sarduy has failed to produce evidence sufficient to rebut Southern Bell's proof of a nondiscriminatory reason for termination.

Accordingly, the undersigned recommends that Southern Bell's Motion for Summary Judgment be GRANTED on the ADEA claim.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Stanley Marcus, United States District Judge, within ten (10) days of receipt. See 28 U.S.C. Sect.636(b)(1)(C); United States v. Warren, 687 F.2d 347 (11th Cir. 1982), cert. denied, 460 U.S. 1087 (1983); and Hardin v. Wainwright, 678 F.2d 589 (5th

Cir. Unit B 1982); see also Thomas v. Arn, 474 U.S. 140 (1985).

RESPECTFULLY SUBMITTED in Miami, Florida, this 22nd day of October, 1992.

TED E. BANDSTRA
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

All counsel of record

FILED by D.C. UNITED STATES DISTRICT COURT
MAR -1 1993 SOUTHERN DISTRICT OF FLORIDA
T.G.CHELEOTIS
CLERK US DIST.CT. CASE 89-1318-CIV-MARCUS
S.D.OF FLA-MIAMI

RAUL SARDUY,
Plaintiff,

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

vs.

SOUTHERN BELL TELEPHONE
TELEGRAPHIC, INC.,
Defendant.
_____/

THIS MATTER has come before the Court upon the Defendant's Motion for Summary Judgment and upon review of the Report and Recommendation of United States Magistrate Judge Ted E. Bandstra who recommended that summary judgment be granted for the Defendant Southern Bell Telephone Telegraphic, Inc. ("Southern Bell"). Magistrate Judge Bandstra concluded that the Plaintiff "has advanced no evidence 'significantly probative' from which a jury could conclude that age was a factor in his discharge." Magistrate Judge's

Report and Recommendation at 7 *(Exhibit C2)*. The Magistrate Judge observed that the Plaintiff had offered no direct evidence of discrimination such as any incriminatory statement by his employer indicating that Sarduy was fired due to his age," id. at 7-8 *(Exhibit C13-14)*, and, as to indirect or circumstantial evidence, Magistrate Judge Bandstra wrote:

> Sarduy's only indirect or circumstantial evidence consists of his age at termination, the age of his replacement (33), and his successful conclusion of 'additional' tasks assigned by his employer prior to discharge. These facts, even viewed in a light most favorable to Sarduy, are not significantly probative on the termination issue. Sarduy's additional 'evidence', in the form of other lawsuits filed against Southern Bell, an affidavit of a co-employee, monies allegedly saved by Southern Bell due to his termination, Southern Bell's denial of administrative remedies following work performance evaluation, and periodic evaluations immediately prior to termination, are either without factual support or are totally irrelevant to the discrimination alleged in this lawsuit.

> Finally, Sarduy's statistical evidence concerning the number of Southern Bell employees terminated over the age of 40 is both miscalculated and meaningless without evidence concerning the size and age distributions of Southern Bell's employees at the time of these alleged terminations and that such employees were similarly situated at the time of their terminations.

Id. at 8 *(Exhibit C15)*.

This Court has undertaken to make a de novo independent review of the entire record, the Magistrate Judge's Report and Recommendation, and written objections taken from that Report. When viewing all of the evidence in a light most favorable to the Plaintiff, non-movant, we are constrained to conclude that Magistrate Judge Bandstra properly concluded that the Plaintiff has failed to come forward with sufficient evidence to establish a prima facie case or to respond sufficiently to rebut Defendant's motion, and, accordingly the Magistrate Judge's Report and Recommendation must be adopted and the

Defendant's Motion for Summary Judgment GRANTED.

Plaintiff, Mr. Raul Sarduy, filed this action against his former employer, Southern Bell, seeking damages for alleged violations of the Age Discrimination Employment Act, Title 29 U.S.C. Sect.621, et seq. ("ADEA"), and the Employee Retirement Income Security Act, Title 29 U.S.C... Sect.1001, et seq. ("ERISA"). The complaint alleged that Southern Bell impermissibly fired Plaintiff from his position as Servicer/Forecaster. On May 7, 1990, Southern Bell filed a motion for summary judgment as to both the ERISA and ADEA claims. On April 24, 1991, the Court dismissed the ERISA claim, finding that Sarduy had failed to exhaust his administrative remedies available under the pension plan at issue. At that time, the Court declined ruling on the ADEA claim in order to allow the parties to

engage in further discovery. On March 2, 1992, Southern Bell filed its second motion for summary judgment on Sarduy's ADEA claims. On April 2, 1992, this Court referred Defendant's motion for summary judgment to Magistrate Judge Bandstra for a Report and Recommendation and, after taking oral argument on the motion and Plaintiff's opposition, the Magistrate Judge issued a lengthy Report and Recommendation on October 22, 1992 recommending that Defendant's motion be granted. Plaintiff filed objections to the Report and Recommendation on November 20, 1992 and Defendant filed a response on December 3, 1992.

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers

> to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Thus, summary judgment may be entered only where there is no genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

In applying this standard, the Eleventh Circuit has explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. Adickes, 398 U.S. at 157, 90 S.Ct at 1608; Marsh, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the non-movant. Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed

to trial. Marsh, 651 F.2d at 991; Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969). Summary Judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co., 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. Impossible Electronics, 669 F.2d at 1031; Croley v. Matson Navigation Co., 434 F.2d 73, 75 (5th Cir. 1970).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. Adickes v. S.H. Kress & Co., 398 U.S. at 160, 90 S.Ct. at 1609-10; Marsh, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. Brunswick Corp. v. Vineber, 370 F.2d 605, 611-12 (5th Cir. 1967). See Dalke v. Upjohn Co., 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982). See also Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985), cert. denied, 475 U.S. 1107 (1986).

The United States Supreme Court has provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern Ry. Co., 320 U.S. 476 479-80, 64 S.Ct. 232, 234, 88 L.Ed 239 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could

reasonably find for the [non-movant]." Id. at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. Id. at 254-55.

In another case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element

> of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added).

The Court's consideration of a motion for summary judgment does not lessen the burden of the non-movant in any way, however. The law requires the non-moving party to come forward with sufficient evidence of each element of his case which he bears the burden of proving. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court must, in ruling on a motion for summary judgment, evaluate the evidence in light of the proper burdens of proof. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In a discrimination case, the plaintiff bears the ultimate burden of proving

discriminatory treatment by a preponderance of the evidence. See e.g., Lincoln v. Board of Regents, 697 F.2d 928, 937 (11th Cir. 1983) (race discrimination).

The relevant standard and doctrines developed under Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sect.2000e, et seq., Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735 (5th Cir. 1977)[1], Schwager v. Sun Oil Company of Pennsylvania, 591 F.2d 58, 60-61 (10th Cir. 1979), and Douglas v. Anderson, 656 F.2d 528, 530-531 (9th Cir. 1981). Plaintiff in the instant case has alleged disparate treatment, i.e., Plaintiff was treated less favorably than other because of his age. Therefore, the methodology

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[1]. In Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit decided prior to October 1, 1981.

developed under Title VII forms theanalytical framework for this case.

Under existing law, age discrimination may be proven by direct or by circumstantial evidence. The allocation of burdens and orders of presentation of proof have been set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 249 (1981) and elaborated upon by the Eleventh Circuit in Rollins v. Techsouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987) (setting out age discrimination standard by adopting McDonnell and Burdine tests). By producing direct evidence, the plaintiff shifts the burden of proof to the defendant, who must then show that there was no discrimination. See Rollins v. Techsouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). Where direct evidence exists,

a defendant has a much higher burden than it would have where only circumstantial evidence is present. See id. at 1528, n. 6; Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557-58 (11th Cir. 1983).

Where circumstantial evidence of discrimination is offered to show discrimination, the plaintiff may establish a prima facie case of violation of ADEA's provision by either proving all prongs of the test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1977) or by introducing statistical proof of discrimination. To meet the McDonnell test, a plaintiff must prove: (1) that he is a member of the protected group (ie, between 40 and 70 years of age); (2) that adverse employment action has been taken against him (e.g., demotion or discharge); (3) that he was replaced by a person

outside of the protected group; and (4) that he was qualified for the position for which he was rejected. Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525 (11th Cir. 1985); Pace v. Southern Ry. System, 701 F.2d 1383, 1386 (11th Cir. 1983); Price v. Mayland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977).

Once a prima facie case is established, a presumption arises that plaintiff was rejected for unlawful discriminatory reasons. This presumption may be rebutted by the defendant establishing a legitimate, nondiscriminatory motive for the rejection. Once such a reason is presented, to prevail the plaintiff must show by a preponderance of the evidence that the articulated reason is merely a pretext, and that the true reason for rejecting plaintiff was age discrimination. Such a showing could be

made by showing that despite the stated business reason, plaintiff would not have been rejected but for the discrimination or that the employer's explanation is simply not credible. See Reynolds v. CLP Corp., 812 F.2d 671 (11th Cir. 1987) (per curiam); see generally, Rollins, 833 F.2d at 1524-25.

Plaintiff has offered no direct evidence in this case. Indeed, in his objections to the Magistrate Judge's Report and Recommendation, the Plaintiff stated that "direct evidence of discrimination was virtually impossible in the instant case" and therefore relied on indirect ways to prove discrimination. (Plaintiff's Objections, p.2). Thus, under controlling law, Plaintiff must establish his prima facie case using either the McDonnell test or statistical evidence. Plaintiff's burden to establish a prima facie case was relieved, however,

by the fact that the Defendant conceded, for the purposes of its motion for summary judgment, that Plaintiff made out a viable prima facie case. The burden then shifted to Defendant Southern Bell to establish a legitimate, nondiscriminatory reason for terminating Raul Sarduy. If Southern Bell presented such a reason, the burden then shifted to the Plaintiff to establish by the requisite evidentiary standard that this reason is merely a pretext for age discrimination. Here, Southern Bell asserted that Raul Sarduy was fired for continued poor job performance. In support of this, Southern Bell offered the affidavits of Sarduy's supervisor as well as voluminous records documenting his job performance. Once Southern Bell presented this nondiscriminatory reason for firing Sarduy, the burden sifted to Plaintiff to establish that Southern Bell's proffered explanation was merely a pretext for age-

based discrimination. The Magistrate Judge found that Plaintiff had not sufficiently carried his burden of proving Southern Bell's reason for termination to be pretextual and therefore recommended granting final summary judgment.

Plaintiff's objection to the Magistrate Judge's Report can be characterized in two ways. First, he argues that Southern Bell was improperly allowed to concede the establishment of a prima facie case after Plaintiff had filed his response brief and therefore he was not given the opportunity to rebut Southern Bell's reason for terminating him. Second, Plaintiff argues that the Magistrate Judge improperly recommended summary judgment, either because it is improper in the context of employment discrimination cases or because there exist genuine issues of material fact which cannot be resolved at the summary

judgment state. Both categories of Plaintiff's objections are unpersuasive.

Plaintiff first argues that Southern Bell has somehow been allowed to prevent him from rebutting the nondiscriminatory reason which Southern Bell presented as the reason for terminating him. Under Plaintiff's theory motion for summary judgment addressed itself only to the issue of whether the Plaintiff had established a prima facie case of age-based discrimination. His response, therefore, addressed itself only to the issue of his prima facie case. Plaintiff then argues that Southern Bell changed horses in mid-stream when, in its reply brief, it conceded for the purposes of the motion that Plaintiff had established a prima facie case but had failed to present any evidence which would prove by a preponderance of the evidence that the reason for termination offered by Southern

Bell is merely a pretext for its true motive of age-based discrimination. From this assumption, Plaintiff argues that, because Southern Bell somehow changed its argument, he has been prevented from having an opportunity to prove that Defendant's reason is pretextual. Plaintiff suggests that Defendant has somehow misled him by changing arguments after he filed his response, thereby cutting off his opportunity to respond to the new arguments raised in the reply brief.

Plaintiff's argument misapprehends Southern Bell's initial motion for summary judgment. Defendant's motion for summary judgment states:

> Plaintiff has presented no evidence that would serve to create a genuine issue of fact concerning his qualifications to remain in the Service/Forecaster title. Plaintiff, therefore, has not stated a prima facie case of age discrimination. (citations omitted) Alternatively,

> assuming Plaintiff made a prima facie showing, Plaintiff has not pierced Southern Bell's rebuttal evidence and created a pretext issue through the introduction of evidence that would allow a fact finder to conclude that he was the victim of discriminatory treatment. (citation omitted) (Defendant's Motion for Summary Judgment, pp. 36-37)

By the plain language of Defendant's motion for summary judgment, Plaintiff was on notice that Southern Bell was arguing both that Plaintiff had presented no evidence meeting the requisite standard to rebut the legitimate, nondiscriminatory reason for firing him which Defendant has presented. Thus, Southern Bell offered evidence that it claimed both undercut Plaintiff's assertion that he was qualified for his position - thereby vitiating Sarduy's prima facie case - and which, in the alternative, presented a legitimate, nondiscriminatory reason for terminating him - namely, that his purportedly poor job performance mandated

firing him. Indeed, Plaintiff seems to acknowledge as much in the conclusion to his memorandum in response to Southern Bell's motion when he states, "[d]efendant used job performance as a pretext to terminate Plaintiff for future cost savings." (Plaintiff's Response, p. 22).

The Plaintiff not only was on notice of Southern Bell's argument regarding the legitimacy of its claimed reason for terminating him but also indicates that he was aware of his need to show that the reason is a pretext for age-based discrimination. In its reply, Southern Bell chose to narrow its argument, conceding Plaintiff established a prima facie case of age-based discrimination (ie, had defeated Southern Bell's first argument), but that he failed to present evidence which would rebut Southern Bell's claimed reason for firing Plaintiff.

Southern Bell's motion for summary judgment informed the Plaintiff that it was presenting what it characterized as a legitimate, nondiscriminatory reason for firing him and he had ample opportunity to carry his evidentiary burden regarding this argument in his response brief. In addition, at oral argument before the Magistrate Judge; both parties had ample opportunity to address all of the issues raised in the briefs. As this included Southern Bell's argument that Sarduy had not rebutted its reason for termination, we are unable to find any prejudice or unfair advantage worked against Plaintiff by Southern Bell advancing two alternative arguments in its motion for summary judgment and then focusing on only one of them in its reply to Sarduy's response.[2]

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[2]. Plaintiff mentions in passing that the Court's failure to rule on his motion to file a surreply to Southern Bell's reply brief prevented

Moreover, the Court has conducted a de novo review of all the evidence presented by Plaintiff in support of his arguments against summary judgment, not merely the evidence in support of his objections to the Magistrate Judge's Report and Recommendation. It is through the prism of all of Plaintiff's evidence, both as it relates to his prima facie case and to the proferred reason for firing him, that the Court assesses the parties' arguments. Accordingly, Plaintiff's argument that Southern Bell was somehow improperly allowed to stifle Plaintiff's the opportunity to assess Plaintiff's

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hin from submitting rebuttal evidence to counter Southern Bell's proffered reason for termination. Local Rule 10(C) does not contemplate the filing of surreplies without prior leave of the Court. Plaintiff was aware of Southern Bell's two pronged argument regarding the lack of a prima facie case and the failure to rebut the reason for termination from the moment the initial motion for summary judgment was filed. Southern Bell's reply brief did not present any new arguments which had not been raised in its initial brief nor did it go

evidence as it relates to his rebuttal of Southern Bell's reason for firing him is not persuasive.

ability to rebut the reason for firing him or that the Court has not been afforded

Plaintiff's second group of objections centers around the propriety of granting summary judgment in an employment discrimination case. First, Plaintiff asserts:

> Federal District Courts are barred from deciding summary judgment

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beyond the scope of rebutting Plaintiff's response. Plaintiff's motion to file a surreply (styled "Plaintiff's Request for Leave of Court to Respond to Defendant's Reply Brief and Supplemental Affidavits in this Summary Judgment Matter") contains no suggestion of any new evidence beyond that already submitted to the Court in Plaintiff's pleadings. Thus, there was no reason to require further briefing on the part of the Plaintiff beyond its response to Southern Bell's motion. In addition, at oral argument before the Magistrate Judge, Plaintiff had the opportunity to bring to the Court's attention any arguments and evidence which he felt had not been properly addressed. Accordingly, Plaintiff's motion for leave to file a surreply to Southern Bell's reply filed on June 29, 1992 is DENIED.

> motions after determining that plaintiff has established a prima facie case of age discrimination and that the employer had articulated nondiscriminatory reasons for the discharge. (Plaintiff's Objections, p. 8)

Based on this understanding of the law, once Southern Bell conceded that a prima facie case had been made out and it presented a legitimate, nondiscriminatory reason for discharge, summary judgment is no longer a viable adjudicatory mechanism because it would require the Court to weigh evidence, make credibility determinations, and draw inferences from the facts, actions which are the province of the jury and not the judge. This argument misconstrues the appropriate use of summary judgment in employment discrimination cases. Contrary to Plaintiff's assertions, the United States

Court of Appeals for the Eleventh Circuit has stated unambiguously that "[S]ummary judgments for defendants are not rare in employment discrimination cases." Early v. Champion Intern. Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). See, e.g., Mauter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Grigsby v. Reynolds Metal Co. 821 F.2d 590 (11th Cir. 1987); Palmer v. District Bd. of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984); and Pace v. Southern Ry. System, 701 F.2d 1383 (11th Cir. 1983). Indeed, the Eleventh Circuit has specifically held:

> Even where a prima facie case has been established but the defendant has rebutted with a proffer of legitimate, nondiscriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented. Pace v. Southern Ry. Sys., 701 F.2d 1383, 1391 (11th Cir. 1983).

This stems from the fact that the ultimate

burden of persuasion in an age discrimination case remains at all times with the plaintiff. Thus, the McDonnell Douglas division of intermediate evidentiary burdens simply aids in resolution of the ultimate question of intentional discrimination. Texas Dept. of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093-94 (1981). (Title VII case) Defendant need only meet the burden of producing a legitimate nondiscriminatory reason for firing the plaintiff in order to rebut the prima facie case established under the McDonnell Douglas test. Plaintiffs burden to prove this reason a pretext then "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." Burdine, 101 S.Ct. at 1095. As stated earlier, plaintiff must satisfy a preponderance of the evidence standard. Failure to introduce evidence

to rebut defendant's presented nondiscriminatory reason for discharge may be grounds for granting summary judgment. Thus, in Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980) (per curiam), the Fifth Circuit Court of Appeals, in binding precedent, held that summary judgment was appropriate when the defendants rebutted plaintiff's prima facie case by showing a legitimate, nondiscriminatory reason for the discharge and plaintiff failed to prove that age, rather than the nondiscriminatory reason, was the motivation for the decision. Accordingly, we must reject Plaintiff's suggestion that, as a matter of law, summary judgment is never appropriate at this stage in an employment discrimination case.

Plaintiff also seems to be arguing on the merits that, whether or not summary judgment is generally appropriate at his

stage in the proceedings, it is not appropriate in this particular instance because of the existence of genuine issues of material fact. Plaintiff has identified eleven material facts still at issue which, he suggests, preclude a grant of summary judgment in favor of Southern Bell. (Plaintiff's Statement of the Material Facts as to Which It is Contended that There Exist Genuine Issues to Be Tried). The eleven facts listed are:

> 1. Age was the determining factor of Plaintiff's termination as Plaintiff was the oldest in his group (age 54) and the closest to attaining full retirement benefits in 2 1/2 years. Further, Plaintiff was replaced by a younger, lower salaried employee outside the protective age group (Sandra Ann Foster, age 33).
>
> 2. The Defendant knew the future cost savings for the company upon the termination of Plaintiff.
>
> 3. The Defendant has a history and pattern of discriminatory practices against their employees intended for cost savings.

4. The Defendant used job performance as pretext to terminate Plaintiff for future cost savings.

5. Plaintiff's termination occurred at a time during Defendant's "Management Reduction Program".

6. Plaintiff was denied his administrative remedies pursuant to Defendant's policies upon Plaintiff's objections and requests to appeal his job performance ratings and including his requests for transfer.

7. Plaintiff's supervisor assigned additional responsibilities onto the Plaintiff during the period of alleged poor job performance while omitting most of the accomplishments in the performance evaluations forms.

8. The Defendant's Motion for Summary Judgment is supported by affidavits that are supplemented by secret, unsigned, unverified "supervisory notes", questionable performance evaluations and ratings, or nothing at all. Additionally, said exhibits are of a technical nature adding to the complexity of Defendant's voluminous filing and exhibits. Further, some exhibits are illegible.

9. During the course of this litigation, Defendant has failed to cooperate with Plaintiff's

discovery process. Further, Defendant violated its Document Retention Policy.

10. Four (4) months after Plaintiff's termination, Defendant conducted a data audit of Plaintiff's past job performance.

11. The instant active cause comes under the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act of 1967, as amended, and the provision in the Civil Rights Act of 1991.

A de novo review of the evidence introduced by Plaintiff to support his opposition to Southern Bell's motion for summary judgment reveals that of these eleven "facts," two are conclusions of law (Nos. 4 and 11), one includes statements of fact and law (No. 1)[3], two are unsupported by any evidence presented by

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3. Plaintiff's "fact" number 1 contains facts (ie, that Plaintiff was the oldest man in his group and that, after being fired, he was replaced by an employee outside ADEA's protected group). However, these facts alone cannot be said to create genuine issues of material fact in dispute and, standing alone, do not suffice to rebut the legitimate nondiscriminatory reason for

Plaintiff[4] (Nos. 2 and 3), and two areirrelevant to rebutting Southern Bell's presented reason of poor job performance (No. 9 and 10). Accordingly, the Court turns to a specific examination of numbers 5, 6, 7, and 8 as possible evidential support for the claimed pretextual nature of Defendant's reason for firing Sarduy.

As noted above, Plaintiff can show that Southern Bell's stated reason is pretextual either by demonstrating that it is not credible or that Southern Bell was more likely motivated by a discriminatory

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firing the Plaintiff presented by Southern Bell. Indeed, Southern Bell concedes that Mr. Sarduy was a member of ADEA's protected group and that he was replaced by a worker outside the statute's scope. In and of themselves, however, these facts do not illustrate the age-based animus that is proscribed by ADEA and which would be necessary in order to reach the legal conclusion also found in "fact" number 1, ie, that age was the determining factor in Plaintiff's termination.

4. Plaintiff argues that Plaintiff's Composite Exhibit 1 proves that Southern Bell knew the amount of cost savings derived from firing him. This Exhibit is a 1987 statement of personal benefits for Raul Sarduy. Plaintiff states that

reason. A de novo review of the evidence indicates that Plaintiff has failed to do so; indeed, Plaintiff offers little more than conclusory allegations beyond the undisputed facts to counter Southern Bell's overwhelming evidence of his poor job performance. Plaintiff bases his pretext argument on a number of issues which the Court will address seriatim.

First, Plaintiff asserts that his termination by Southern Bell occurred during Southern Bell's "Management

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he used this to calculate that Southern Bell saved over $250,000 in future costs by firing him. (Affidavit in Support of Response, p. 30) Even ignoring the fact that Plaintiff offered no guidance as to how he derived this total future cost from his benefits statement, Plaintiff's failure to offer anything beyond unsupported speculation that his managers were aware that he would be eligible for a pension in two and one-half years does not advance his pretext argument. See Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 658-59 (7th Cir. 1991) (Employer's knowledge of employee's approaching eligibility for pension is not sufficient to infer that the employer acted impermissibly on that knowledge, "[O]therwise every worker who lost his job within months, or perhaps years, before the full vesting of his pension would have a prima facie case of age discrimination.")

Reduction Program." Plaintiff allegesthat this plan was initiated to reduce the number of management staff pursuant to the break-up of AT&T. Presumably, Plaintiff would have the Court conclude that Southern Bell adopted a systematic program to fire management-level employees within ADEA's protected category. Plaintiff offers the Court no description of this plan nor does he offer any evidence regarding the existence of this plan. Indeed, he merely relies on the bald statement that this plan existed and that he was terminated during its implementation, leaving the Court to infer both its existence and its improper purpose. This unsupported statement alone cannot serve to create the existence of a genuine issue of material fact regarding Plaintiff's termination and therefore does not prevent entry of summary judgment against him.

In support of his thesis that Southern Bell initiated a concerted plan to divest itself of its older employees, Plaintiff presents some statistical evidence which he claims establishes that during 1986 and 1987 employees over the age of forty were discharged at a disproportionately higher rate than employees under forty. A de novo review of the statistics offered as evidence by the Plaintiff reveals their complete inadequacy to inform the Court as to that point. As an initial matter, Plaintiff has failed to provide any information which allows the Court to determine whether the terminated employees were similarly situated, what the size and age distribution of the employee population from which those individuals were drawn, and whether the same size is large enough to allow conclusions that are statistically supportable. The statistics

offered have not been placed in any meaningful context, and standing alone they cannot fairly be taken as creating a material issue of fact.

A description of Plaintiff Composite Exhibit 2 evidences its inability to support even a modest inference of disproportional firing of employees above the age of forty. Plaintiff's Composite Exhibit 2 consists of two lists. The first ("List A") lists those employees fired in 1986 and 1987 from some work-unit at Southern Bell, although Plaintiff does not explain from which geographic area or job-type this group is drawn. This list indicates that in 1986, four out of twenty six, or 15%, fired employees were over the age of forty and in 1987, eleven out of twenty six, or 42%, fired employees were over the age of forty. These figures, standing alone, do not indicate a pattern of intentional discrimination against

individuals within ADEA's protected group. The second list ("List B") consists of the total age charges against Southern Bell from 1985 to 1988 in south, southeast, and north Florida. Thus, List A and List B represent completely different records; the former apparently list all employees fired during a given year while the latter lists only those employees who filed age discrimination claims during a given year. Thus, List B's member will be, by definition, members of ADEA's protected group and cannot be aggregated with the members of List A in a meaningful way. Plaintiff's conclusions from this exhibit indicate that the only way he could calculate his figure is if he added the two lists together to determine the total number of employees fired during a given year and the total number who fell within the statute's protected group.[5] Because these two lists facially indicate that

they cannot be used together absent more information placing them in a meaningful context, Plaintiff's conclusions from them present no evidence with which to rebut Southern Bell's reason for firing him and certainly do not present evidence, using

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5. Plaintiff claims that the total number of employees fired during 1986 was 37 and that, of those, 15 were over forty, yielding 40.54%. For 1987, Plaintiff claims that 32 employees were fired and 17 were over forty, yielding 53.13%. The only apparent way Plaintiff could reach these figures would be if he added the two lists together.

the applicable preponderance of the evidence standard, from which a jury could reasonably find for Plaintiff, Sarduy.

Second, Plaintiff has offered no evidence to rebut Southern Bell's claim that he was terminated for poor job performance. Plaintiff's job performance ratings for 1982, 1983, 1984, 1985, and 1986 are "marginal performance," "limited contribution," satisfactory contribution," "satisfactory contribution," and "limited

contribution" respectively. In further support of it claim that Sarduy performed poorly on the job, Southern Bell relies on the notes maintained by Plaintiff's supervisor, Richard Eiger. These notes document in great detail the difficulty Plaintiff is said to have experienced in completing his job satisfactorily and his inability to improve his job performance despite being placed on a performance improvement plan after receiving his rating for 1986.[6] The notes reflect discussions that Eiger had with Mr. Sarduy regarding his continuing inability to perform the basic tasks of a Service/ Forecaster and Eiger's own observations regarding the poor performance by Sarduy.[7] The remainder of Eiger's notes detail the continuing difficulties the Plaintiff experienced performing the requirements of his job, the continued reviews held by Eiger with the Plaintiff regarding

Plaintiff's performance, and the continued warning received by the Plaintiff that a failure to improve could result in dismissal.

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6. In his Opposition to [Defendant's] Statement of Uncontested Material Facts, Plaintiff alleges that the performance improvement plan he signed on January 26, 1987 was obsolete and signed under implied threats of termination. Plaintiff offers no evidence to support this claim.

7. For example, in a note dated January 19, 1987, Eiger states:

> I discussed Raul's fourth quarter results and informed him that I was assigning him a rating of LC for the fourth quarter of

Plaintiff makes no effort to dispute the content of these notes, instead focusing his attention on what he alleges to be the surreptitious nature by which they were made and kept by Eiger. Plaintiff has not introduced any evidence which suggest that these notes were improperly kept by Eiger or that they were only kept about Plaintiff as part of a

concerted effort to fire him. According to Eiger, these notes were part of his normal routine of memorializing

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> 1986 and for the year 1986 overall.... I then discussed the corrective action that was being implemented for Raul's performance. I told Raul that I no additional schools to send him to since he had taken all appropriate training (some more than once). ... I told him that we would get together at least on a monthly basis to discuss his progress. I informed Raul that I was giving him six months from the date of our meeting to improve his performance to a Satisfactory level. I made Raul aware that at the end of the six month period, if he had not improved his performance to a Satisfactory level, he was subject to action on the part of the company which could include demotion or termination of employment. (Attachment to Richard Eiger's Affidavit).

significant interaction with his subordinates, especially when it relates to job performance. (Affidavit of Richard Eiger, p.8) Moreover, according to Eiger's supervisor, the maintenance of these types of notes is common among Southern Bell managers and does not violate any Southern Bell policy. (Supplemental Affidavit of

Larry Spiller, p.3).

Plaintiff does argue that certain special tasks which he performed were left out of Eiger's notes. He asserts that the

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In a note dated March 4, 1987, Eiger describes his review with Mr. Sarduy of the year end gain and loss report:

> In this process, we identified over 35 errors on Raul's gain and loss report. During this review, I showed Raul his copy of the gain and loss report and I asked him why there were so many errors. All I can state is that I truly do not know what Raul was talking about as he gave me his excuse for having so many errors. ... He finally did admit, and I might add the first admission to any of his difficulties, that if there were errors on the report, that he guesses they were his errors. I left the subject. (Attachment to Richard Eiger's Affidavit).

Court can infer from this that Eiger engaged in a deliberate attempt to create a paper record which would falsely convey the message that Plaintiff could not perform his job. Based on the uncontroverted affidavits filed by Southern Bell and Plaintiff's own deposition testimony, these special tasks

consisted of routine tasks which did not require Plaintiff to take on more responsibility than normal. For example, Plaintiff states that he coordinated the

Umbilical Forecast for the remote switching units in South and Southeast Florida. (Affidavit of Raul Sarduy in Support of Response to Motion for Summary Judgment, p. 27). Plaintiff offers no explanation of what these responsibilities included nor how they differed from the responsibilities assumed in the normal course of his job. Richard Eiger's affidavit states that the Umbilical Forecast was a report prepared by employees outside of his work group and that Plaintiff's responsibilities were limited to obtaining and distributing a copy of the forecast to the other Servicer/Forecasters within Eiger's work group. Another example given by Plaintiff

is that he took on the duties of a co-worker who was on a leave of absence. At deposition, however, Plaintiff indicated that he assumed only a portion of these duties and the remainder was divided among the other Service/Forecaster in Plaintiff's work group. (Sarduy Depo., p. 333) In short, Plaintiff has not supported his contention that he assumed extraordinary duties that were not included in Eiger's job performance reports. As such, these allegations cannot rebut the evidence contained in Eiger's records that Sarduy consistently performed below expectations as a Servicer/Forecaster.

Finally, Plaintiff contends that Southern Bell violated a number of its own practices and procedures in order to fire him for reasons other than poor job performance. Mr. Sarduy states that Southern Bell ignored his request for an

appeal of the performance rating given to him by Eiger. (Response, p. 21; Affidavit in Support of Response, p. 27) A review of Plaintiff's deposition transcript indicates that Plaintiff appealed those job performance rating with which he disagree to the officer superior to Plaintiff's immediate supervisor. (Depo. pp., 1112-115; 125-127; 212-213) While Plaintiff may not have been satisfied with the results he obtained from the appellate process, no issue of fact in dispute is presented by the claim. See, e.g., Trans-Orient Marine v. Star Trading & Marine, 925 F.2d 566, (2nd Cir. 1991)("... a party may not, in order to defeat a summary judgment motion, create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony."); Davidson & Jones v. Elmore Dev., 921 F.2d 1343, 1353 (6th Cir. 1991)("...after a motion for summary

judgment has been filed ... a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony.") Plaintiff's Composite Exhibit 4 contains the Southern Bell procedure for appealing job performance ratings. This policy states that any employee desiring to appeal his rating beyond his department bears the burden to discuss the matter with the appropriate Personnel Department representative. Plaintiff has presented no evidence that he attempted to appeal his rating beyond the level of Eiger's supervisor. Under Southern Bell's written policy, he bore the burden of pursuing any appeal of his performance ratings and, in the absence of any evidence that he did so, Plaintiff's allegations that his desire for an appeal was ignored cannot create a genuine issue of material fact prohibiting summary judgment.

Plaintiff alleges that he was improperly forced to take and pass a test in order to qualify for a transfer from a management to a non-management position. Plaintiff argues that this test was irrelevant to his transfer from management to non-management and, because he did not have to take this type of test for his previous promotion and various transfers, the fact that Southern Bell imposed it on him at this point in his career constituted harassment and implied a desire to create a pretext for firing him. (Response, p. 23; Affidavit in Support of Response, pp 27-28) According to Larry Spiller's affidavit, Southern Bell adopted a policy in 1986-1987 requiring any management employee who had been working outside the non-management ranks for more than five years to demonstrate his technical competence to return to a non-management position by passing a

standardized, validated test. This policy remains in effect today. (Spiller's Supplemental Affidavit, p. 4) This uncontroverted evidence indicates that this test was neither irrelevant to the transfer from management to non-management nor was it applied to Plaintiff in a manner which suggests disparate treatment. Because the uncontroverted evidence indicates that all similarly situated individuals switching from management to non-management positions were required to take this test, Plaintiff's allegations regarding the propriety of the test do not create genuine issues of material fact regarding Southern Bell's presented reason for firing Plaintiff.

Plaintiff also alleges that his attempts to appeal his request for a transfer were ignored in the face of Southern Bell's policy allowing such appeals. (Response at pp. 11-12; Affidavit

in Support of Response, p. 30) The only evidence submitted by Plaintiff regarding Southern Bell's appeals process is Plaintiff's Composite Exhibit 4. This Exhibit consists of two documents. The first is titled "Appeals of Ratings" and, as such, creates no procedure for appealing a denial of a request for transfer. The second document consists of Southern Bell's "Plan for Self-Identification and Publication of Anticipated Management Movement" which establishes a procedure by which managers desiring a transfer can let other managers have spaces to fill know of their availability. However, this document does not establish a procedure for appealing a denial of a request for transfer. In addition, Defendant has introduced evidence stating that it has no formal policy whereby employees can appeal denials of transfer requests. (Spiller's

Supplemental Affidavit, p. 3). Because of the lack of any evidence that Southern Bell had a procedure for appealing transfer requests, Plaintiff's assertion that Southern Bell violated its policy is not responding to his appeals of the denial of his requests does not create genuine issues of material fact regarding Southern Bell's presented reason for firing him.

A plaintiff in an ADEA case face with a motion for summary judgment cannot simple rely on the barest possibility that a jury would infer a discriminatory motive, but rather must come forward with competent evidence to establish a prima facie case and respond sufficiently to any rebuttal by defendant. Pace v. Southern Ry. System, 701 F.2d 1383, 1391 (11th Cir. 1983) In this case, when viewed through the applicable evidentiary standard, Mr. Sarduy has failed to produce evidence

sufficient to create material issues of fact in dispute or to otherwise rebut Southern Bell's presentation of a nondiscriminatory reason for termination. Accordingly, applying the controlling standards of law, this Court is constrained to adopt the Magistrate Judge's Report and Recommendation and to GRANT Southern Bell's motion for Summary Judgment. The Defendant is directed to submit a proposed order of final summary judgment within 15 days of this Order.

DONE AND ORDERED in Miami, Florida this 1st day of March, 1993.

STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record
Magistrate Judge Ted E. Bandstra

(DO NOT PUBLISH)

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 14 1995
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5093
Non-Argument Calendar

D. C. Docket No. 89-1318-CIV-Marcus

RAUL SARDUY,

Plaintiff-Appellant,

versus

SOUTHERN BELL TELEPHONE
TELEGRAPHIC, INC., a
Georgia Corporation,

Defendant-Appellee.

Appeal from the U.S. District Court
for the Southern District of Florida

(April 14, 1995)

Before BIRCH and BLACK, Circuit Judges,
and JOHNSON, Senior Circuit Judge.

PER CURIAM:

Raul Sarduy appeals the district court's grant of summary judgment for Southern Bell Telephone and Telegraph Company ("Southern Bell"). Southern Bell terminated Sarduy from his position as a Servicer/Forecaster in 1987. In June 1989, Sarduy brought this action against Southern Bell, contending that his termination violated (1) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. Sect. 623 (West 1985 & Supp. 1994), and (2) Sect. 510 of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C.A. Sect. 1132 (West 1985 & Supp. 1994).

In April 1991, the district court granted summary judgment to Southern Bell on the ERISA count on the ground that Sarduy had failed to exhaust remedies available to him under the BellSouth Management Pension Plan. In March 1993, the district court granted summary

judgment to Southern Bell on the ADEA count on the ground that Sarduy had failed to produce evidence to create a genuine issue of fact with respect to Southern Bell's purported legitimate, nondiscriminatory reasons for firing Sarduy.

On appeal, Sarduy contends (1) that the district court erred in finding that no genuine issue of fact existed with respect to the ADEA claim and (2) that the district court granted summary judgment on the ERISA claim without providing him with a sufficient opportunity for discovery. After reviewing the record, we conclude that Sarduy's contentions are meritless.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 1 1995
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5093
Non-Argument Calendar

RAUL SARDUY,

Plaintiff-Appellee,

versus

SOUTHERN BELL TELEPHONE
TELEGRAPHIC, INC., a
Georgia Corporation,

Defendant-Appellant.

Appeal from the U.S. District Court
for the Southern District of Florida

Before BIRCH and BLACK, Circuit Judges,
and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing filed by Appellant, Raul Sarduy, is DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE